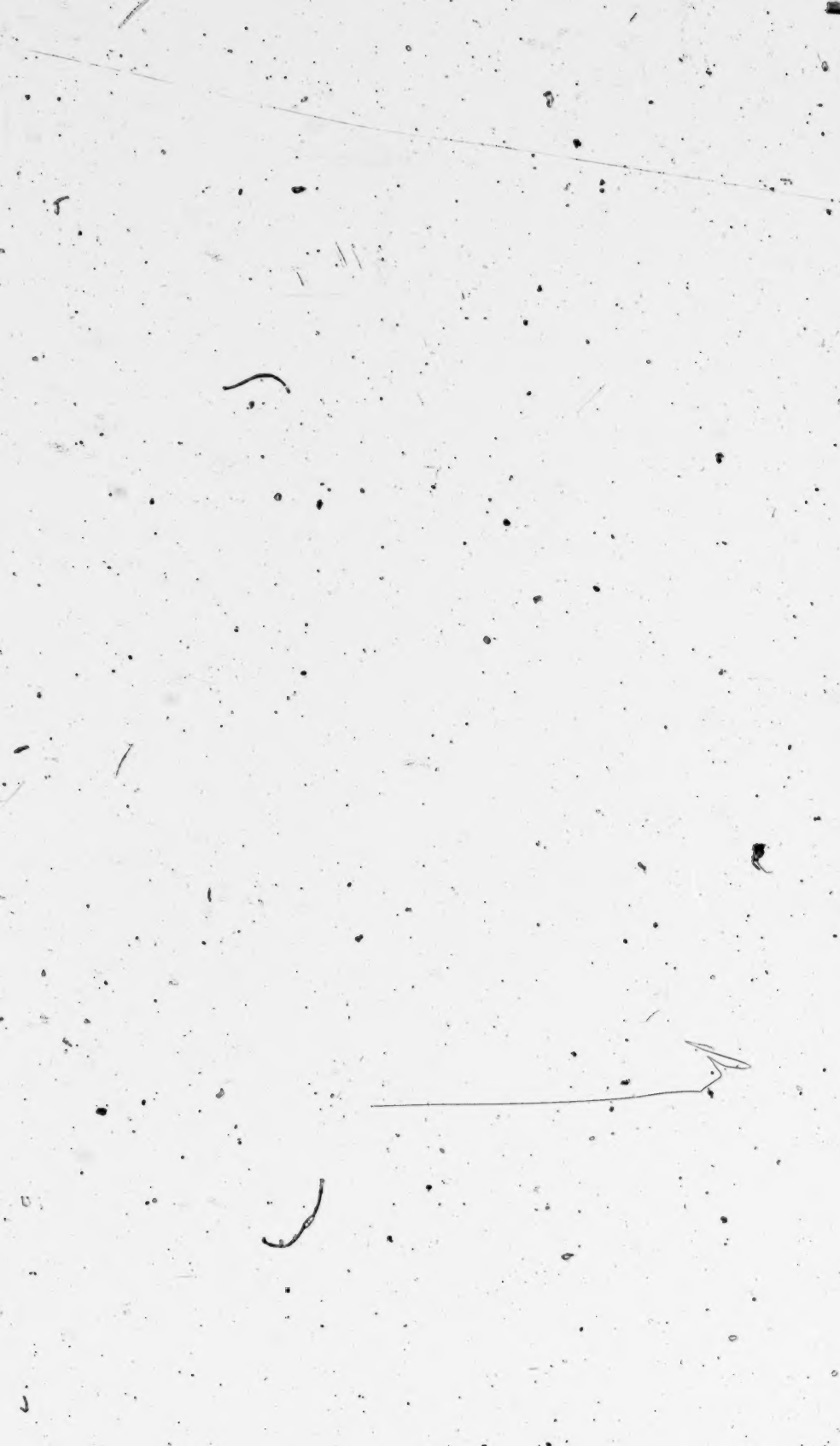

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 535

GREGG CARTAGE & STORAGE COMPANY, HUGH WELLS, TRUSTEE IN BANKRUPTCY OF THE GREGG CARTAGE & STORAGE COMPANY, AND NORTHEASTERN TRANSPORTATION COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

STATEMENT AS TO JURISDICTION.

HOWELL LEUCK,
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STATEMENT AS TO JURISDICTION.

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the Gregg Cartage & Storage Company, Hugh Wells, Trustee in bankruptcy of the Gregg Cartage & Storage Company, and the Northeastern Transportation Company submit herewith their statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause:

A. The statutory provisions believed to sustain jurisdiction are Sections 238 of the Judicial Code as amended by

the Act of February 13, 1925 (c. 229, 43 Stat. 936, par. (4); U. S. C., Title 28, Sec. 345) and Title 28, Section 47a, of the United States Code, and, particularly, the following provision thereof:

> "A final judgment or decree of the District Court in the cases specified in Section 44 of this Title may be reviewed by the Supreme Court of the United States if an appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases * * *."

B. The Statute of the United States, a construction of which is involved herein, is the Act of August 9, 1935, 54 Stat. 923, 919 and 924; Title 49, Sections 306(a), 309(a) and 312 of the United States Code; also known as Sections 206(a), 209(a) and 212 of the Motor Carriers Act of 1935, contain the following provisions:

> Section 206(a). (Added August 9, 1935, as amended June 29, 1938, and September 18, 1940.) (U. S. Code, title 49, sec. 306; 54 Stat. L. 923) prohibits a common carrier by motor vehicle to operate unless it has first received a certificate of public convenience and necessity. It is provided, however, that if any such carrier or its predecessor in interest was in bona fide operation on July 1, 1935 "and has so operated since that time * * * except * * * as to interruptions of service from which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, * * *."
>
> Section 209(a). (Added August 9, 1935, as amended June 29, 1938, and September 18, 1940.) (U. S. Code, title 49, sec. 309; 54 Stat. L. 919) contains similar provisions concerning contract carriers and provides that instead of a certificate of convenience and necessity that a permit shall be issued to such contract carrier.

Section 212(a). (Added August 9, 1935, as amended June 29, 1938, and September 18, 1940.) (U. S. Code, title 49, sec. 312; 54 Stat. L. 924) provides that certificates, permits and licenses shall be effective from the date specified therein and shall remain effective until suspended or terminated. It further provides that any certificate, permit or license may be amended or revoked, in whole or in part, upon the application of the holder thereof or may, upon complaint or the Commission's own initiative, "be suspended, changed, revoked in whole or in part for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license. Provided, however, that no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder."

Section 212(b) reads as follows:

Except as provided in Section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.

C. The decree sought to be reviewed was entered on May 19, 1941; and the petition for appeal was presented to the District Court on July 14, 1941.

D. This action grows out of the Motor Carriers Act (Title 49, Section 304 of the U. S. C.) under which the Interstate

---

[1] Section 212(a), as originally added to on August 9, 1935, contained a ninety-day provision rather than a thirty-day one as provided in the above act. This clause was amended as of June 29, 1938.

Commerce Commission, on June 1, 1935, assumed jurisdiction of all motor trucking companies engaged in transporting merchandise from State to State.

By the provisions of the Act, those motor carriers who have been in operation prior to the enactment were entitled to be granted a certificate to continue in business without any showing other than prior operations and these rights were commonly known as "Grandfather Rights". We believe it is conceded that the Gregg Cartage & Storage Company had qualified in every respect for such a certificate and there is nothing in the record to indicate that it would not have received its certificate except for certain incidents which occurred after it had filed its appliation for a certificate.

These incidents began about October 30, 1937 and may be attributed to an involuntary petition in bankruptcy pending for a period extending from October 30, 1937 to early in January, 1938. Prior to January, 1938, the intervening petitioner, Northeastern Transportation Company, had purchased the operating rights from the trustee in bankruptcy and had promptly filed an application to file tariffs and resume service. An application for a certificate of public convenience and necessity was filed and was set for hearing and on December 17, 1937, the examiner recommended that the Gregg Cartage & Storage Company of Cleveland, Ohio, be granted a certificate of public convenience and necessity under the "Grandfather's Clause" of the Motor Carrier Act of 1935. This recommendation was based upon a finding that the applicant was operating as a common carrier by motor vehicle of general commodities in interstate or foreign commerce over irregular routes between points in Ohio, West Virginia, Pennsylvania, New York, New Jersey, Delaware, Maryland, Connecticut, Massachusetts, Rhode Island, Indiana, Michigan, Illinois, Missouri and the District of Columbia by reason of having been engaged in

such operation on June 1, 1935 and continuously since that time.

Thereafter, on April 8, 1938, the Interstate Commerce Commission set the application of the Gregg Cartage & Storage Company for further hearing.

On May 4, 1938, a hearing was had in accordance with the above-mentioned notice, after the Examiner ruled as follows:

> "The order of the Commission doesn't designate specifically what the issues are, as you know, counsel. However, it is the Examiner's understanding, and he now rules, that the evidence involved at this time and the issues which are to be considered here relate to the question of interruption of service as a result of a receiver of the applicant in the two dockets which are before the Examiner at this time. Your testimony and evidence will relate then to the interruption of service. With that understanding, you may proceed."

On the 29th day of June, 1938, the Examiner made his report based upon the evidence presented before him on May 4, 1938, and recommended that the Commission find that the interruption of service was one over which applicant has no control and that the applicant be authorized to resume operations as a common carrier by motor vehicle of general commodities in interstate or foreign commerce over the routes and between the points set out in the prior report.

Exceptions were seasonably filed to the said report and thereafter on November 14, 1938, Division 5 of the Interstate Commerce Commission denied the application on the grounds that there had been an interruption of service within the control of the applicant and that all "grandfather" rights were lost thereafter.

The Gregg Cartage & Storage Company seasonably filed its petition for re-argument and re-consideration of its

application before the entire Interstate Commerce Commission, and on April 13, 1939, the Interstate Commerce Commission heard an oral argument on the said application, and on December 12, 1939, the Commission affirmed the report of Division 5. To this affirmation the applicant filed its petition requesting a re-argument and re-consideration before the entire Commission, which application was denied by the Commission on April 8, 1940.

On November 13, 1937, the Federal Court Receiver for the Gregg Cartage & Storage Company filed an application to sell the "grandfather" rights to the Northeastern Transportation Company, which sale was confirmed by the United States District Court for the Northern District of Ohio, Eastern Division, on December 6, 1937. The purchaser immediately filed its application with the Interstate Commerce Commission seeking to be substituted for the original applicant, the Gregg Cartage & Storage Company. This application was dismissed by the Commission on June 13, 1940, after the petition of the applicant had been filed in the District Court of the United States for the Northern District of Ohio, Eastern Division, and on August 29, 1940, a petition was filed on behalf of the Northeastern Transportation Company for re-argument and re-consideration before the entire Interstate Commerce Commission on the question of the application for substitution which had been filed by the purchaser. This petition was denied by the Interstate Commerce Commission on November 13, 1940. Plaintiffs then brought suit in the District Court of the United States for the Northern District of Ohio, Eastern Division, and the Northeastern Transportation Company filed its intervening petition, both petitioners seeking to enjoin and annul the order issued by the Interstate Commerce Commission. A final hearing was held by the District Court of three judges, one of whom was a Circuit Judge, and the Court entered its judgment and found that

there was no reason to set aside, annul or suspend the order of the Commission. A copy of the opinion of the District Court is appended hereto, together with the Court's findings of fact and conclusions of law.

E. The questions presented are substantial and of great importance both to numerous motor carriers claiming "grandfather" rights to certificates and to the Commission before which a large number of applications for certificates under the "grandfather" clause are pending. The District Court's decision in this case is the first by any Court on the questions involved in this appeal.

F. The following decisions sustain the jurisdiction of the Supreme Court to entertain an appeal in this case:

United States v. *Maher*, 307 U. S. 148;
United States v. *Pan American Petroleum Corp.*, 304 U. S. 156;
B. & O. R. R. Co. et al. v. *United States*, 304 U. S. 58.
Escanaba & Lake Superior R. R. Co. v. *United States*, 303 U. S. 315;
United States v. *American Sheet & Tin Plate Co.*, 301 U. S. 402.
Youngstown Sheet & Tube Co. v. *United States*, 295 U. S. 476.

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APPENDIX.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Filed Feb. 20, 1941. C. B. Watkins, Clerk. U. S. District Court N. D. O.

Civil Action No. 20369.

GREGG CARTAGE & STORAGE COMPANY, HUGH WELLS, Trustee in Bankruptcy of the Gregg Cartage & Storage Company, Plaintiffs,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, Defendants.

NORTHEASTERN TRANSPORTATION COMPANY, Intervener.

Opinion.

Before Allen, Circuit Judge, Jones and Wilkin, District Judges.

PER CURIAM:

This action was brought under Sec. 41(28), 43-48 Title 28 U. S. C., to set aside, annul or suspend an order of the Interstate Commerce Commission which denied the plaintiff's application for certificate of convenience and necessity, as provided for in Sec. 306(a) Title 49 U. S. C.

The Intervener, Northeastern Transportation Company, claims to have succeeded to the rights and interests of the plaintiff by virtue of sale and assignment from the receiver of the bankrupt estate of the plaintiff. (Sec. 45a, Title 28 U. S. C.)

There is no dispute as to the essential facts. The question presented is whether the ruling upon the facts by the Commission is justified in law.

The undisputed evidence shows that the plaintiff was in operation on June 1, 1935, and was therefore entitled to the rights specified in Sec. 306(a) Title 49 U. S. C., known as "grandfather" rights. On February 12, 1936, the plaintiff filed an application for certificate of authorization. Plaintiff was at that time insured against public liability by the Central Mutual Insurance Company, and in Janu-

ary, 1937, such insurance company was adjudged a bankrupt and ceased payment of all claims, leaving the plaintiff with about $200,000 of liabilities. Being unable to discharge such obligations, the plaintiff asked for the appointment of a receiver in the common pleas court of Cuyahoga County, Ohio, on October 4, 1937. At the same time creditors filed a petition in bankruptcy, and the plaintiff was adjudged bankrupt by this court (West, J.). On October 14, 1937, plaintiff made application to the Interstate Commerce Commission for permission to suspend operations without prejudice to its "grandfather" rights. Such permission was denied for want of authority by the Commission. On October 30, 1937, a receiver was appointed for the bankrupt estate, and, on December 6, 1937, the good will and assets of the plaintiff, including its rights under pending applications with the Commission, were sold by the receiver at public auction to the Intervener for $850.

The state court receiver, between October 5 and October 30, confined his operations to deliveries of shipments then *en route*. No new business was accepted. The federal court receiver sought no authority to continue operations and confined his efforts to liquidating the business. After sale, the federal court receiver and the Intervener filed a joint request that the Intervener be substituted as applicant for plaintiff's "grandfather" rights. Action on the application for substitution was held in abeyance by the Commission pending determination of plaintiff's original application. Pending determination of such applications, no operations were engaged in by the Intervener, although it had asked permission to file tariffs and resume service.

The original application was referred to an Examiner, who, on December 17, 1937, recommended allowance of the application. The matter was referred again to an Examiner for further hearing on the question of "discontinuance of operation". Hearing was had on May 4, 1938, and on June 29 the Examiner recommended that applicant be granted a certificate because the interruption in service was one beyond applicant's control. In November, 1938, the application and the Examiner's report were reviewed by Division 5 of the Commission and the application was

denied. On December 12, 1939, after review by the full Commission, the decision of Division 5 was sustained, upon the ground that the interruption of service following bankruptcy was fatal to applicant's rights.

Section 306(a) provides that a carrier in operation on June 1, 1935, shall be granted a certificate provided it has operated *bona fide* since that time. But it excepts from the requirement as to operation "interruption of service over which the applicant or its predecessor in interest had no control". The plaintiff and the intervener contend that the evidence reveals a state of facts "over which the applicant or its predecessor in interest had no control". It is their view that the interruption of service was due entirely to the failure of the insurance company, which created a condition clearly beyond their control.

The Commission, however, declined to look beyond the bankruptcy. It held bankruptcy to be a matter within the control of the applicant without considering the causes of bankruptcy. Such a ruling by the Commission is the adoption of a proper administrative policy or the application of a rule of law, and in either case it seems to be a proper exercise of its authority and not subject to change by this court. A line of demarcation must be drawn somewhere, and bankruptcy seems to be a reasonable point on which to establish it. If failure of the company insuring the applicant should be held to be reason for exonerating the applicant, then responsibility for countless other causes of bankruptcy would also have to be determined. Even if it were conceded that the applicant had no responsibility regarding the insurance company, it could hardly be said that it had no control over the large amount of accident claims filed against it.

The rule or policy established by the Commission seems supported by the holding of the Supreme Court in the case of Chicago Auditorium Association v. Central Trust Co., Trustee, 240 U. S. 581, 591, in which the court said:

"* * * bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt".

When the court said:

"We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement, within the doctrine of Rochm *v.* Horst, supra."

it established an analogy for the Commission's rule that bankruptcy is within the control of the applicant.

The plaintiff and intervener point out that if the original application had been acted upon promptly by the Commission, a certificate would have been granted, and that then it could not have been revoked unless the holder thereof had willfully failed to comply, within a reasonable time, not less than thirty days, with a lawful order of the Commission, commanding obedience to the law. Sec. 212(a). This cannot be denied. If the application had been acted upon between February 12, 1936, the date of its filing, and October 5, 1937, the date of bankruptcy and interruption of service, it no doubt would have been allowed.

The evidence, however, does not disclose that the failure of the Commission to act upon the application within that time was arbitrary or intentional. The number of motor carriers entitled to "grandfather" rights was so great that all their applications under Section 306(a) could not possibly have been considered within such period. When in due course the Commission came to the consideration of plaintiff's application, it found that there had been an intervening interruption of service. That, so the Commission held, was as fatal as if applicant had not been in operation on June 1, 1935. The Commission construed the words of the statute "and has so operated since that time" to require continuity of operation from June 1, 1935 to the date of the determination of the application. The Commission had provided in Rule 6 of the regulations governing transfers that "the transfer of any operating right under which operations are not being conducted at the time of the proposed transfer will be approved only upon a showing that the cessation of operations was caused by circumstances over which the holder of such operating rights had no control".

The Commission declined in this case, as it had in former cases, to determine the rights of the applicant as of the date of the filing of the application. Atlantic Motor Exp. Inc., Common Carrier Application, 12 M. C. C. 576, 579-80. It is argued that this practice of the Commission varied from the strict practice of courts at common law. But even the courts have liberalized the practice in order that judgments and decrees might be influenced by conditions at the time they are made. Rule 15, Rules of Civil Procedure. This court cannot say that the rule of practice adopted by the Commission has no rational basis or is contrary to law. Congress declared the purpose and policy of the Motor Carrier Act, 1935, to be "to promote adequate, economical and efficient service by motor carriers". Section 302. Continuity of operation is necessary to such service, and the requirement of continuity is not dispensed with when the application for a certificate is filed. The Commission is an administrative agency and its proper function requires a different procedure from that of courts of law. When the sale from plaintiff to intervener was made, the "grandfather" rights had been lost through suspension of operation, and such rights had therefore been lost before the application was heard. Prior to the granting of the certificate the right of the plaintiff was merely tentative or inchoate and was lost by disuse. It would be unreasonable to expect the Commission to grant the application and then immediately start proceedings to revoke it. When the Commission refused permission to suspend, the applicant should have realized that operation was necessary to preserve "grandfather" rights.

This court cannot agree with the statement that the ruling of the Commission is contrary to the intent of Congress. The argument was advanced that—

"If such interruptions in service are to be construed as putting an end to 'grandfather' rights of carriers * * * then, where such a carrier goes into receivership or bankruptcy, and such an interruption occurs, it would be impossible for the carrier to come out of receivership and resume operations; * * * if a corporation, it could not be reorganized under the corporate reorganization provisions of

the Bankruptcy Act, and creditors could realize nothing from 'grandfather' rights, however valuable."

If, in such circumstances, the continuation of operations should seem warranted, the court having jurisdiction of the receivership or the bankruptcy could order such continuation at the very time that it took jurisdiction, and such operation would be lawful pending determination of the application for a certificate. Sec. 306(a). Bankruptcy Act, Secs. 2, 115, 112 (Title 11, Secs. 11, 515, 512 U. S. C.); Lorain Steel Co. v. Union Ry., 165 Fed. 500; Pomeroy's Equity Jurisprudence, 4th ed., Sec. 1622.

In this case the condition of the bankrupt did not warrant a request for permission to operate. The bankrupt was insolvent and had no insurance. The number of claims against it indicated the inadvisability of an order allowing operation without public liability insurance. In such case, the plaintiff's "grandfather" rights were lost, and the creditors must of course bear that loss along with the other results of bankruptcy. A sound public policy has always considered continuity of service necessary for the continuation of a franchise to use the public highways. Congress definitely expressed this public policy in the Motor Carrier Act. If the applicant in this case had continued its operations, its "grandfather" rights would have been preserved until the time of hearing the application. But, as the Commission said:

"While the parties seem to have acted with reasonable diligence in pressing forward the proceedings necessary to the sale of the operating rights, they failed to preserve the existence of the subject matter of the sale by maintaining the continuity of the actual operations after every necessary preliminary had been accomplished" (p. 20).

No sufficient reason is presented for interfering with the finding of the Commission, "that applicant, because of the described interruption in service, has failed to establish the right to a certificate or permit under the 'grandfather' clauses of the Act".

There were in fact three applications before the Commission, Nos. MC-51204 and MC-51088, both seeking certificates

to authorize operations as a common carrier, and No. MC-51089, seeking a license to authorize operation as a broker. The Commission said (Division 5):

"With respect to applicant's request for a broker's license, it should be noted that any rights which it may have had to continue brokerage operations cannot be transferred or sold to another party, Spencer Broker Application, 8 M. C. C. 141; and we conclude that applicant, being bankrupt, properly could not be granted such a license" (p. 261).

This court finds no reason to set aside, annul or suspend the order of the Commission.